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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. A CAUSE OF ACTION TO COLLECT A WITHDRAWAL LIABILITY PAYMENT ARISES WHEN A SCHEDULED PAYMENT IS MISSED.

(a) Respondent Ferbar Corporation's primary submission is that under the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1381-1461, the cause of action to collect unpaid withdrawal liability arises on the date of withdrawal. Brief for Respondent ("Resp. Br.") at 15. At the same time, Ferbar acknowledges that the well-established "proposition that the statute of limitations begins to run from the time the action first could have been instituted" is "correct." Resp. Br. at 18; *see* Brief for the Petitioner ("Pet. Br.") at 14-15. Thus, of necessity respondent must—and does—maintain that fund trustees can maintain a suit to collect withdrawal liability from an employer on the date on which the employer ceases making contributions to a multiemployer pension fund. Resp. Br. at 17.

This proposition, critical to Ferbar's entire argument, could not be more wrong. Any MPPAA withdrawal liability collection lawsuit filed *before* the fund makes an assessment and demand and the employer fails to make one or more timely payments would necessarily be summarily dismissed, because, until that point, the employer has not violated any obligation under the statute. Pet. Br. at 16-21.

Ferbar fervently maintains otherwise, relying on § 1451(a). Resp. Br. at 16-17. That section provides that "[a] plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief." Ferbar's argument is that this section permits fund trustees to file suit whenever a plan is "adversely affected," and that a plan is necessarily so affected by an employer's withdrawal from the plan. Resp. Br. at 16-20.

But § 1451(a) does not provide a cause of action in the air for *any* adverse effect on multiemployer pension funds. That section establishes a cause of action only where the adverse effect is caused "by the act or omission of any party *under this subtitle*" (emphasis added), confirming that Congress intended to permit suit at the point that a breach of a *statutory* obligation occurs.

Thus, the essential point here is that an employer commits no violation of MPPAA by withdrawing from a multiemployer pension fund. The statutory scheme, rather, imposes withdrawal liability as an incident of an employer's *lawful* cessation of plan contributions. § 1383(a). Withdrawal itself is perfectly proper under ERISA, and therefore cannot be analogized, as Ferbar would have it, to a tort, breach of contract, statutory violation or other action inconsistent with an obligation imposed by law. Only by failing to pay one or more of the statutorily-mandated withdrawal liability payments *after* the fund makes an assessment and demand upon the withdrawn employer does the employer violate its statutory obligations. Pet. Br. at 16-20.

The theory of the MPPAA withdrawal liability scheme confirms that the statute's purpose is not to prohibit withdrawals, but to provide an approximate, carefully-devised economic replacement for the contributions the withdrawn employers would have made, so that plans may meet their future benefit obligations. As enacted, ERISA had provided that employers withdrawing from multiemployer plans were "subject to a contingent liability that was dependent upon the plan's termination in the next five years. . . ." *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 608 (1993). MPPAA, enacted to amend ERISA in this respect, created instead "a *prophylactic* extension of the liability initially imposed by ERISA . . . to insure that 'an employer withdrawing from a multiemployer plan w[ill] . . . complete funding its fair share of the plan's unfunded liabilities.' " *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 231

(1986) (O'Connor, J., concurring) (emphasis supplied, citations omitted.) *See also id.* at 217, citation omitted ("withdrawal liability would discourage voluntary withdrawals" and "cushion the financial impact on the plan.")

The MPPAA withdrawal liability scheme, then, is simply a " 'legislative Act[] adjusting the burdens and benefits of economic life' . . ." as between certain employers and their employees, (*Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728 (1984) *quoting Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)), not a means of redress for a breach of some legal obligation perpetually to contribute to pension funds once the employer begins doing so. That is why the MPPAA does not pretend to "make withdrawing employers pay an actuarially perfect fair share, namely a set of payments in amounts that, when invested, would theoretically produce . . . a sum precisely sufficient to pay (the employer's proportional share of) a plan's estimated future vested benefits." *Milwaukee Brewery Workers Pension Plan v. Jos. Schlitz Brewing Co.*, 115 S. Ct. 981, 990 (1995) ("*Schlitz*"). And, that is why the Act does not provide a cause of action for withdrawal, but a cause of action for failing to meet the obligation to make withdrawal liability payments once that obligation is imposed through a fund trustees' assessment and demand.

(b) A firm confirmation that the MPPAA does not permit fund trustees to sue to collect withdrawal liability on the date of withdrawal is that such a lawsuit would be inconsistent with the plethora of detail in the statute covering collection of that liability.

For example, for the reasons discussed in detail in our opening brief, there are a myriad of circumstances under the statute in which a suit filed on the date of withdrawal could not possibly allege a ripe cause of action because the events necessary to establish whether there had been a withdrawal could not yet have occurred. *See* Pet. Br. at

16-19.[1] Nor could a lawsuit on the withdrawal date, if it were filed, demand cognizable relief in the form of payment of a portion of the withdrawal liability—*viz.* the kind of relief that is the *sine qua non* of collection suits. Before assessment and demand, an employer has no obligation to make any periodic payment. And, the statute does not require an employer to pay the total liability amount as long as the employer is meeting the obligation to make timely payment of the periodic payments calculated under §§ 1399(c)(1)(A), (c)(3), and (c)(1)(C) & (E); *see* Pet. Br. at 24-25, 28-31. The trustees therefore could not sue for the total amount of withdrawal liability either.

Finally, a lawsuit filed on the date of withdrawal could not even adjudicate in the abstract whether some liability will be owed at some time in the future. The statute contemplates that questions concerning the existence and the proper amount of withdrawal liability will be decided by an *arbitrator*, not a court, and establishes with specificity the timing and procedures of the arbitration and ensuing judicial review. § 1401; *see generally Concrete Pipe, supra.* And, the arbitration requirement in the statute, and related internal review provisions, are pegged to the date of assessment and demand, and do not come into play before then. § 1401; *see* also § 1399(b)(2).

Ferbar does suggest that fund trustees could file a lawsuit on the date of withdrawal anyway, even though at that time they "cannot, with honesty, make the necessary allegations to support an action." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 515 (1967). But such a "protective suit would be a sheer formality—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts." *Id.* There

[1] These insurmountable timing problems, we stress, are not simply problems of knowledge, accounted for by the § 1451(f)(2) alternative, shorter statute of limitations. Rather, events such as the return of a construction employer (§ 1383(b)), or the PBGC trucking industry determination (§ 1383(d)), *occur* after the date later retroactively determined to be the date of complete withdrawal.

is no indication MPPAA intended to authorize such pointless lawsuits.

(c) A final, compelling indication that the § 1451(a) cause of action for the entire withdrawal liability due does not arise on the date of withdrawal is that if it did, the limitations periods provided in § 1451(f) would prevent trustees from suing on any withdrawal liability payments due more than six years after the withdrawal date. Yet, under the complex statutory scheme for setting the withdrawal liability periodic payment schedule, payments can be due for up to twenty years, as in this case. J.A. 23. The result of Ferbar's statutory construction, then, would be that an employer could with impunity refuse to make the statutorily-required payments due more than six years from the date of withdrawal. Ferbar's attempt to deal with this glaringly absurd consequence of its approach to the statute fails utterly.

Ferbar proposes that § 1451(b) of the statute resolves the uncollectable payments problem, by "requir[ing] employers who are making regular withdrawal liability payments to continue paying." Resp. Br. at 34. Section 1451(b) accomplishes this end, we are told, because, by making one or more payments, an employer "has agreed to the imposition and scheduling process instituted by the fund," and is therefore "subject to court actions for missed payments." Resp. Br. at 33-34. This § 1451(b) interpretation is made of whole cloth.

The provision upon which Ferbar hangs so much of its argument reads in its entirety as follows:

> § 1451(b): In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

Section 1145, in turn, provides that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the

> plan or under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of such plan or such agreement.

And, §1132(g) specifies that in a successful suit to collect contributions due under § 1145, the remedies shall include, in addition to the unpaid contributions, interest, attorneys' fees, and statutory liquidated damages.

Nothing in § 1451(b) indicates that § 1451(b), or any other withdrawal liability provision in the MPPAA, applies only to "[a]n employer who agreed to the process by commencing payment." Resp. Br. at 34. Section 1451(b) on its face applies to "*any* failure of the employer to make *any* withdrawal liability payment within the time prescribed." (Emphasis supplied). There is no exception for the first withdrawal liability payment due, nor any indication that an employer can simply opt out of the mandatory *statutory* requirement to make *all* withdrawal liability payments by the time the payment is due by failing to make the first such payment.

Section 1451(b)'s reference to § 1145 and, through § 1145 to § 1132(g), does not provide any support to Ferbar's construction either. Section 1451(b) specifically recognizes that an action to collect overdue withdrawal liability payments may be brought "under this section"—that is, under § 1451 as a whole. *See also* § 1451(c) (special venue provision for withdrawal liability collection suits "under this section."). Thus, the references to § 1145 and, implicitly, to § 1132, do not direct that withdrawal payment collection suits be brought under § 1132.

Nor do those references, as Ferbar at one point suggests (Resp. Br. at 34), substitute, under the borrowing principle used for suits that do arise under § 1132, the limitations periods of the 50 states for the uniform limitations period contained in § 1451(f). Instead, as the legislative history expressly states, the statutory reference in § 1451(b) to § 1145 simply incorporates for § 1451(b) withdrawal liability collection purposes the *remedies* available for a violation of § 1145. 126 Cong. Rec. 23,039 (Aug. 25, 1980) (statement of Rep. Thompson). *See, e.g., Amalgamated Ins. Fund Trustees v. Sheldon Hall Clothing,* 862 F.2d 1020 (3rd Cir. 1988); *Galgay v. Beaverbrook Coal Co.,* 105 F.3d 137 (3rd Cir. 1997).

Finally, it is very much to the point in this regard that nothing in § 1451(b) or the cross-referenced statutes indicates an intention to transform the MPPAA mandatory requirement to make periodic withdrawal liability payments into an obligation that applies only to employers who agree to meet that obligation. To the contrary, the primary purpose of § 1145 is to convert contractual obligations by participating employers to make pension fund contributions *into* statutory ones, so that statutory remedies will be available where the contributions are not made. Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Report on S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 43-44 (Comm. Print April 1980); 126 Cong. Rec. 23,039 (Aug. 25, 1980) (statement of Rep. Thompson). There is no indication whatever in § 1451(b) that alchemy in the other direction—from statutory requirement to private agreement—was intended.

(d) To justify its invitation to judicial revision of the MPPAA, Ferbar seeks to analogize this withdrawal liability statute of limitations case to cases brought after the defendant has committed a tort or a statutory violation, where the plaintiff has to, or chooses to, resort to an administrative procedure to perfect his or her claim. *Unexcelled Chemical Corp. v. United States,* 345 U.S. 59

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[2] Section 1145 applies directly only to employers "obligated to make contributions . . . under the terms of the plan or under the terms of a collective bargaining agreement"; employers subject to a withdrawal liability obligation by definition are not so obligated. § 1383(a); *see* p. 2, *supra*. And, § 1451(b) states that failures to make withdrawal liability payments are to be treated "in the same manner as" delinquent contributions under § 1145, not that missed withdrawal liability payments are to be treated *as* delinquent contributions under that section.

(1953); *McMahon v. United States*, 342 U.S. 25, 27 (1951). Both *Unexcelled Chemical* and *McMahon*, however, are fully consistent with the usual rule that a cause of action accrues and the statute of limitations begins to run, at the earliest, once the defendant's wrong has occurred. *Unexcelled Chemical*, 345 U.S. at 65 ("A cause of action is created when there is a breach of duty owed the plaintiff"); *McMahon*, 342 U.S. at 26-27 (the "limitation depended upon the event giving rise to the claims," that is, the "actionable wrongs"); *see also Reading Co. v. Koons*, 271 U.S. 58, 64 (1926) (a cause of action for wrongful death accrues "on the happening of the events which fix the defendant's liability".

Unexcelled Chemical and *McMahon* thus establish *not* that suit could be filed *before* the defendant had violated any legal obligation, but only that where such a violation has taken place the statute of limitations can then begin to run despite the filing of administrative proceedings relating to the claim.[3]

[3] Further, in *Unexcelled Chemical*, "the United States, to which damages were payable, could have brought suit without first resorting to administrative remedies." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 518 (1967). *See also Reading Co., supra*, 271 U.S. at 62-63 (decedent's beneficiaries could have filed the lawsuit upon the decedent's death); *Crown Coat Front Co.* at 517 (explaining that in *McMahon*, suit was filed under the Clarification Act, 57 Stat. 45, amendment to the Suits in Admiralty Act, bringing a seaman's action for negligence and seaworthiness within the Suits in Admiralty Act; although the Clarification Act "permits court action only if the claim has been administratively disallowed . . . [t]he Court saw no indications that Congress in passing the Clarification Act intended to postpone the usual time of accrual of the cause of action [under the Suits in Admiralty Act] until the date of disallowance").

It is worth noting that Ferbar's representation to the contrary notwithstanding (Resp. Br. at 30), the benefit denial cause of action in ERISA has been uniformly construed so that the cause of action does not accrue and the limitations period does not begin to run until internal appeals have been exhausted. *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 71-72 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989); *Jenkins v. Local 705, International Bhd. of Teamsters Pension Plan*, 713 F.2d 247, 249, 254 (7th Cir. 1983); *Hemphill v. Unisys Corp.*, 855 F. Supp. 1225 (D. Utah 1994); *Kroschinsky v. Trustees of Steamship Trade Assoc.*, 790 F. Supp. 559 (D. Md. 1992).

So here: the limitations period begins to run once the employer fails to make a required periodic payment, and is not affected by the pendency of arbitration proceedings under the statute.

Indeed, the truly analogous statute of limitations cases in this Court—those concerning the payment of monetary debts dependent upon a prior assessment of and demand for the debt—are fully consistent with our position in this case. *See Woods v. Stone*, 333 U.S. 472, 476 (1948) (limitations period runs from refund order, not from date excess rent was collected, because "[t]he duty to refund was created and measured by the refund order, and was not breached until that order was disobeyed"); *Rawlings v. Ray*, 312 U.S. 96 (1941); *Fisher v. Whiten*, 317 U.S. 217, 220-21 (1942); *Cope v. Anderson*, 331 U.S. 461, 464 (1947).

II. THAT CONGRESS DECIDED TO REQUIRE THE INITIAL ASSESSMENT TO BE MADE "AS SOON AS PRACTICABLE," RATHER THAN WITHIN A FIXED TIME PERIOD, PROVIDES NO BASIS FOR REWRITING MPPAA.

Ferbar's remaining arguments reduce to a quarrel with Congress' decision to provide a promptness standard for a fund's assessment of withdrawal liability that is not expressed as a fixed period of time after the statutory withdrawal date. MPPAA directs that the assessment be made "as soon as practicable after an employer's complete or partial withdrawal." § 1399(b)(1). Ferbar characterizes this standard as permitting trustees in their "absolute direction" and "whim" to delay "indefinitely" sending out the initial assessment. Resp. Br. at 20-23. Ferbar's "solution" is to revise MPPAA to start the § 1451(f) fixed-time-period limitations provisions for a collection action on the withdrawal date, so as to encompass the assessment period.

It suffices to point out that statutory revision is a task for Congress not this Court. There is, however, also a great deal to be said on Congress'—and § 1399(b)(1)'s—behalf.

(a) The initial assessment is the fundamental step in MPPAA's scheme of assessing and collecting withdrawal liability. This assessment puts the employer on notice of the fund trustees' claim, starts the time period for requesting review and arbitration, requires the employer to begin making withdrawal liability payments regardless of any request for review, and becomes final if not challenged.

Congress' decision *not* to set a fixed time within which the assessment must be made clearly was a considered choice, as MPPAA contains fixed time periods within which virtually every *other* step connected with the determination or collection of withdrawal liability must be taken, *e.g.*, § 1399(a), (b)(2)(A), (c)(2), § 1401(a)(1). This choice to set a situation-sensitive rather than an inflexible period for judging the promptness of the initial payment demand makes good sense, because, for a number of reasons, the period after withdrawal within which it is in fact practicable to assess withdrawal liability will range widely, from a few weeks to many years.

First, as we explained in our opening brief, under MPPAA there are many situations in which the question whether an employer has withdrawn must be answered retroactiveiy, based on events that occur years after the date that MPPAA deems to have been the withdrawal date. Pet. Br. at 17-19.

Second, in many instances it will not be practicable to calculate withdrawal liability immediately. Calculation of withdrawal liability depends on the plan's unfunded vested liability as of the last day of the plan year preceding the date of withdrawal (*Schlitz*, 115 S. Ct. at 986), and fund trustees determine that unfunded vested liability for the purposes of annual reports that ordinarily are not filed until 7 months after the close of the plan year, and the filing of which may be extended an additional 2½

months. § 1024(a)(1).[4] Thus, for employers (like Ferbar) that effect withdrawals toward the beginning of a plan year, there would be up to a 9½ month delay before the pertinent calculation of unfunded vested liability is available.[5]

These delays are "structural," in that they are built into the manner by which MPPAA fixes the withdrawal date and liability. There also will be other circumstances, such as a mass withdrawal or major labor dispute affecting plan contributors, that will affect the time period within which it is "practicable" for the fund trustees to assess withdrawal liability. Congress can hardly be faulted for recognizing the variability of these circumstances and resisting the siren song of a fixed time period for initial notice to the withdrawn employer.

(b) That Congress did not set a *fixed* time period within the initial assessment must be made does not mean that Congress set *no* time period at all, or left employers indefinitely in limbo, with no way to determine their potential liability. The directive to act "as soon as practicable" *is* a statutory command, and fund trustees must follow it. Ferbar, after so recognizing by describing the directive to make the initial assessment "as soon as prac-

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[4] As the Court recognized in *Schlitz*, Congress intended fund trustees to be able to rely on the annual report in assessing withdrawal liability, which is why MPPAA deems all withdrawals occurring during a plan year to have occurred, for calculation purposes, as of the last day of the preceding plan year. 115 S. Ct. at 986. *See also* 126 Cong. Rec. 23,041 (Aug. 25, 1980) (statement of Rep. Thompson).

[5] Some MPPAA methodologies for calculating withdrawal liability (including the methodology adopted by this plan) also require determination of withdrawing enployers' prior *required* contributions to the plan, rather than their actual contributions. Making this determination generally necessitates a payroll audit of the withdrawn employers. *See* J.A. 40; *see also* § 1391(c)(3) (setting forth calculation method adopted by this plan). And, the calculation of withdrawal liability may require the fund trustees first to obtain records within the possession of the employer, not the plan, a contingency MPPAA recognizes and provides for. § 1399(a).

ticable" as "the fundamental statutory requirement for plan sponsors" (Resp. Br. at 4), nonetheless writes that language out of MPPAA *entirely* by claiming the statutory requiremnt could not be enforced, or would be ineffective if it were (Resp. Br. at 47-48).

But there is a built-in incentive for prompt assessment, as the fund forever will lose interest on withdrawal liability payments not timely demanded. Pet. Br. at 39-40. And, if the trustees violate their § 1399(b)(1) duty to make the initial assessment "as soon as practicable," this failure to comply with the statute can be raised by the employer in arbitration as a defense to liability. Pet. Br. at 40. The "as soon as practicable standard," that is, creates a defense quite similar to laches, requiring the decisionmaker to consider all the relevant circumstances in determining timeliness. And laches, which has a fine historical pedigree (*see Patterson v. Hewitt,* 195 U.S. 309, 317 (1904)), is not an invitation to indefinite delay, but a way of judging timeliness different from the fixed limitations period approach.

Nor is the hypothetical employer concerned about delay in assessing withdrawal liability and not "able to plan [its] business and financial future[] with any degree of certainty" (Resp. Br. at 22) without other recourse under MPPAA. That employer may "request in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability" and "make available general information necessary for the employer to compute its withdrawal liability" and similar information "unique to that employer." § 1401(c). The fund trustees have a duty to comply with such a request.

(c) Throughout its brief, Ferbar suggests that *it* (Ferbar) did not receive a timely initial assessment, and that the statute should be interpreted so as to prevent such delays in the future. In fact, the record is silent on the circumstances surrounding the initial assessment here. And, there is no reason to torture the statute to deal with delay in initial assessments because, as we have

noted, such delay is a defense in arbitration. Ferbar's problem here is that Ferbar waived this issue by not raising the issue in its Notice of Initiation of Arbitration. J.A. 38. Ferbar sought arbitration *only* as to the issues in its letter to the plan requesting review and those issues did *not* include any issue regarding the timing of the initial assessment. J.A. 31-34.

Ferbar similarly seeks to distract attention from the statutory interpretation question presented here by claiming that its efforts to invoke the MPPAA arbitration procedures were frustrated because the fund "ignored Ferbar's timely Initiation of Arbitration of the dispute." Resp. Br. at 20. Again, the present record is silent on why the arbitration did not take place. In this instance, however, since Ferbar did raise this issue as an affirmative defense in the District Court, it would be open for consideration on remand. J.A. 16. We note that one circumstance that may be relevant to the arbitration defense on remand is that Ferbar began violating its absoulte statutory duty to make withdrawal liability payments pending review *before* its Notice of Initiation of Arbitration was even filed.[6]

(d) Ferbar's suggested revision of MPPAA—to subsume the § 1399(b)(1) "as soon as practicable" period for making the initial assessment within the six-year § 1451(f) limitations period for filing a collection suit—would create the anomalies discussed at pp. 3-7, *supra,* while doing nothing to address the purported problem of delayed initial assessments. For it would be coincidence

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[6] Additional factors that may be relevant to the arbitration issue on remand are that (1) PBGC regulations provide that the commencement of arbitration proceedings after initiation of arbitration is the obligation of *both* parties, who must select an arbitrator within 45 days or agree to extend that period (29 C.F.R. § 4221.4(a)); and (2) PBGC regulations also provide the remedy in the event of delay: "[E]ither party . . . may seek the designation and appointment of an arbitrator in a United States district court pursuant to the provisions of title 9 of the United States Code." 29 C.F.R. § 4221.4(b).

if the six-year period after the withdrawal date turned out to be a good proxy for the time period within which it is practicable to make the initial assessment; obviously in most situations the "practicable" period will be far shorter. Ferbar, after all, complains about an assessment made less than two years, not more than six years, after withdrawal. Thus, unless Ferbar seeks to excise the "as soon as practicable" standard from the statute entirely, this standard will still have force in the vast bulk of cases—and claims of prejudice from delay would still come before arbitrators.

(e) The surface appeal of Ferbar's statutory revision is in Ferbar's claim that its approach would provide a set date after withdrawal after which it is absolutely certain that an employer can raise the statute of limitations as a defense to payment of withdrawal liability. But that claim is false. Although the basic six-year § 1451 (f)(1) limitations period is fixed, the alternative § 1451 (f)(2) limitations period is "3 years after the earliest date on which the plaintiff acquired or should have acquired knowledge of the existence of such cause of action, except that the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action." Thus, under Ferbar's revised statute, there would be no date *certain* after which the statute of limitations definitely had run.

The effect of the revision would, as Ferbar recognizes throughout its brief, also be to make § 1451(f)(2) the *basic* limitations provision applicable to many withdrawal liability collection cases. Resp. Br. 24-29. This would substitute litigation as to when trustees "acquired or should have acquired" knowledge of the withdrawal, and whether there was "fraud or concealment" for the straightforward application of a fixed six-year limitations period running from the date payment was due.[7]

[7] Ferbar argues that our interpretation of MPPAA renders § 1451(f)(2) surplussage and therefore should be rejected, because

The salient point in any event is not whether Ferbar's revised MPPAA is superior to the statute Congress drafted—although Ferbar's revision is plainly inferior—but that the statute as it is written makes basic sense. Congress need not provide a fixed limitations period for situations in which one would be inappropriate. *See, e.g. Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977). Laches is a proven doctrine, and there is no reason why a defense similar to laches is not proper in this context. To be sure, the employer who receives an untimely assessment must raise the failure to give timely notice in arbitration, but a statute of limitations is always raised in litigation, so the burden is not appreciably different.[8]

III. CONGRESS DID NOT INTEND TO REJECT SETTLED PRINCIPLES APPLYING STATUTES OF LIMITATIONS TO INSTALLMENT OBLIGATIONS.

Ferbar's remaining contention is that if we are correct that a cause of action to collect an overdue withdrawal liability payment arises (and the limitations period therefore begins to run) on the date a payment is missed, the Court should not follow, as to the remaining payments, the established principles applying statutes of limitations to installment obligations.

§ 1451(f)(2) would have effect only for *some* types of cases under § 1451 rather than all of them. Resp. Br. at 27-29. This Court has rejected the same argument before. *See Patterson v. Shumate*, 504 U.S. 753, 763 ((1992) ("Petitioner's surplussage argument fails. . . . [o]nce petitioner concedes that" the provision would have some effect.). For examples of the variety of § 1451 actions to which the § 1451(f)(2) limitations period might be applicable, *see* Steven R. Bruce, *Pension Claims: Rights and Obligations* 760-62 (2d ed. 1993).

[8] Ferbar does not dispute that plan participants and beneficiaries could sue trustees who fail to promptly assess withdrawal ilability for breach of fiduciary duty under § 1113. Resp. Br. at 33. But Ferbar argues that under our construction of MPPAA they would not be able to sue under § 1451 as well. Even if that were true (which we doubt), we fail to see why one provision authorizing suit against procrastinating trustees would be insufficient.

Before turning to Ferbar's contention on its merits (or more accurately lack thereof), we point out that nothing in this case turns on this point. Ferbar has not disputed that in this case suit was filed within 6 years of the day the first installment payment was actually due, as both MPPAA and the Plan rules provide a 60-day grace period for the initial payment. Pet. Br. at 35; *see also* Resp. Br. at 4 n.2.[9] And, even assuming that this suit was untimely as to the first payment, and that in general the § 1451(f) limitations period *does* begin to run on the remaining withdrawal liability payments as soon as plan trustees, through a proper declaration of a default, could demand those payments, Ferbar has not disputed that in this case the remaining payments could *not* have been demanded more than six years prior to suit. Pet. Br. 33-35.[10]

Having said this, it is nonetheless true that Congress did structure MPPAA's withdrawal liability obligation as a series of installment payments with a provision for acceleration, at the trustees' option, in the event of default. In so doing, Congress legislated against as settled a backdrop for determining how such obligations are treated for limitations purposes as one is likely to find in the law. Pet. Br. at 27-33. There is nothing in MPPAA to suggest that Congress intended different, unique limitations principles crafted by the courts to apply, with the resultant uncertainty that would cause for fund trustees. As this Court has stated in many other contexts, we "should not

[9] The initial notice was sent on December 12, 1986. J.A. 23. The 60-day grace period expired on February 10, 1987. Suit was filed on February 9, 1993. J.A. 6.

[10] Because the fund trustees could not in any event have made the remaining payments due more than six years before suit was filed, the question whether the acceleration clause was properly invoked in this case—and when—need not be reached. In their Complaint, the trustees alleged that the fund was entitled to the full amount due or, in the alternative, the amount of the overdue installments. J.A. 9-11. In its Answer, Ferbar alleged that "Plaintiff did not follow the prescribed default and acceleration procedure." J.A. 17. This is an issue for the District Court on remand.

lightly assume that Congress has intended to depart from established principles." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

(a) According to Ferbar, MPPAA does not require payment in installments but instead offers installments as a payment "option" the withdrawing employer affirmatively must select. Resp. Br. at 43-44. That is a gross misstatement of what MPPAA provides. The statute provides that trustees have no choice but to provide for payment in installments over time and that, unless the default procedure can be properly invoked, wait for, and accept periodic payment. The employer's "option" to "*prepay* the outstanding amount of the unpaid withdrawal liability payments" (§ 1399(c)(4) (emphasis supplied)) is exactly what it says it is—an option to pay *sooner* than the statute requires, not an option to reject the periodic payment requirement *without* making any advance payments. And, of course, such a prepayment option does not distinguish the withdrawal liability obligation from other installment obligations, as the debtor generally has an option to pay in advance in mortgage and other installment payment contexts.

Ferbar's contention that traditional principles applying limitations periods to installments govern only where the obligation is contractual has no basis in law or in reason either. The statute of limitations runs separately as to installment obligations because of the character of the obligation (to make a series of payments due on different dates), not because of the character of the source of the obligation. That is why, for example, the limitations period runs payment-by-payment on *judgments* requiring installment payments, the most obvious examples of installment obligations imposed by law rather than agreement. *See, e.g., Kuhn v. Kuhn*, 402 N.E.2d 989, 992 (Ind. 1980); *Miller v. Miller*, 122 F.2d 209 (App. D.C. 1941); *Roberts v. Roberts*, 420 P.2d 864 (Wash. 1996); *Mark v. Safren*, 38 Cal. Rptr. 500 (Cal. App. 1964).

That is also why the basic limitations rule for *statutory* obligations generally is that a plaintiff may recover for each separate statutory violation that occurs within the limitations period, a rule that often leads to separate limitations periods for a series of similar but separate statutory violations. *See* Brief for the United States at 23.

(b) As we read its brief, Ferbar, attempting to distinguish the limitations principles applicable if the *first* withdrawal liability payment is missed from those applicable once that payment is made, contends in essence that not making the first withdrawal payment is a "repudiation" of the entire obligation, bringing the whole sum due and starting the limitations period running. But MPPAA rests on a quite different repudiation concept. The default provisions in the statute, and PBGC regulations, prescribe the circumstances in which future payments can be collected in advance. Those circumstances are that nonpayment is not cured within 60 days after notice to the employer of the delinquency, and that the period for requesting, or if requested, completing, arbitration have passed. § 1399(c)(5); 29 C.F.R. § 4219.31. Thus, the nonpayment of the first installment of withdrawal liability is *not* a default.

Further, even if MPPAA did not speak to the issue, the law is well-settled that a unilateral obligation to pay money in installments cannot be "repudiated," and thereby automatically accelerated, by nonpayment, or even by the debtor's stated determination not to pay at all. Rather, absent an acceleration provision, the creditor still must await each sum as it comes due. Restatement (Second) of Contracts § 243(3) & cmt. c. Otherwise, *every* obligation payable in installments would contain an implied acceleration provision.

(c) As for Ferbar's contentions that traditional limitations principles cannot work in the MPPAA context, it is important to be clear that under MPPAA the resolution of MPPAA disputes over whether an employer is responsible for paying withdrawal liability, and if so, the amount of

liability and schedule for payments proceed on a separate track from actions to collect overdue withdrawal liability payments. In collection proceedings, the validity of the underlying debt is *not* at issue. *See* Pet. Br. at 21; §§ 1399(c)(2), 1401(b)(1), 1401(d).

Thus, an MPPAA collection action will in all likelihood involve fewer issues of evidence or proof than collection actions based on, for example, loans or notes, which are the obligations most frequently payable in installments in the commercial world. That the accepted principles applying limitations periods to installment obligations have stood the text of time in *those* contexts, where the courts do have to determine merits issues in each collection action, demonstrate they would not be unworkable here.

(d) Finally—and Ferbar has a heavy burden here—Ferbar attacks the wisdom of the traditional principles applying statutes of limitations to installment obligations that heretofore seem to have received universal acceptance. Although experience is the best demonstration that those principles are not "absurd" (Resp. Br. at 36 (citation omitted)), the principles also follow from the general rule that the failure of a debtor to make one installment does not entitle the creditor to insist upon the remainder. We know that MPPAA accepts *that* general rule as its starting proposition because MPPAA includes a provision allowing, under specified circumstances, trustees to alter the status quo by declaring a default and accelerating the due date of the remaining installments.[11]

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[11] MPPAA's default provision provides that, upon acceleration, interest on the overdue sum is calculated "from the due date of the first payment which was not timely made" (§ 1399(c)(5)). Ferbar contends the statute of limitations on the remaining payments must run from that date as well. The provision, however, is in terms a provision regarding *only* the calculation of interest, and it simply places the defaulted employer in a worse position in terms of the calculation of interest than if withdrawal liability payments were made on schedule. The provision itself distinguishes the date on which the remaining withdrawal liability payments can actually be demanded ("[i]n the event of *default*, a plan sponsor can require

Ferbar contends, finally, that traditional limitations principles might allow for a "multiplicity of actions," and that this disfavored result must be rejected because "Congressional intent is lacking." Resp. Br. at 38. But that contention is, at bottom, a disagreement with Congress' decision to make the MPPAA acceleration-on-default clause permissive rather than mandatory. As a practical matter, in any event, a suit for collection of overdue withdrawal liability payments is likely to include, as it did here (J.A. 11), a prayer for an injunction to require that the remaining payments be made on schedule, so multiple lawsuits are unlikely. *See, e.g., Galgay v. Beaverbrook Coal Co., supra.*

CONCLUSION

For the foregoing reasons and those set forth in the Brief for the Petitioner, the judgment below should be reversed.

Respectfully submittd,

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immediate payment of the outstanding amount" (§ 1399(c)(5) (emphasis supplied)) from the date from which interest will be calculated if a default occurs and the acceleration provision is in fact exercised. As the Court recognized in *Schlitz*, MPPAA divorces the dates used for calculation of interest from the dates payments are actually made. 115 S.Ct. at 991.